Filed 11/30/12 P. v. Bowen-Farwell CA1/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. DAVID BOWEN-FARWELL, Defendant and Appellant.	A132180 (Sonoma County Super. Ct. Nos. SCR507217, SCR592439)

David Bowen-Farwell (appellant) appeals from a judgment entered after the trial court revoked his probation and executed a previously suspended sentence of six years and eight months in state prison. He contends: (1) his attorney rendered ineffective assistance of counsel by failing to move to suppress evidence recovered in a probation search; (2) the court erred by revoking his probation because he had been relieved of all conditions of probation except paying restitution; and (3) two probation-related fees must be stricken and the $80 court security fee must be reduced to $40. We reject the contentions and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On March 6, 2007, a felony complaint was filed in case SCR507217 charging appellant with residential burglary (Pen. Code, § 459[1]). The complaint was based on an incident that occurred on January 26, 2007. According to the probation report, an officer was dispatched to a Santa Rosa residence at approximately 8:12 p.m. that evening to

[1] All further statutory references are to the Penal Code unless otherwise stated.

investigate a burglary. The victim reported that the front door to his residence was open and a light was on in his son's bedroom when he arrived home from work. A sliding glass door was off of its track and hanging at an angle. Several rooms in the residence were ransacked and rummaged through and items were strewn about the residence. Some of the items stolen included several Franklin Mint collector items, a video game console and video games, a television, a surround sound system, a digital camera, and numerous items of jewelry valued at over $11,000. While the officer was collecting fingerprints, a neighbor informed the officer that he had seen a "very suspicious male loitering near his residence early that day." When the neighbor asked the man what he was doing, the man asked for a lighter. The neighbor said no, and the man walked slowly across the front of the victim's residence, then towards the side gate. The neighbor provided a description of the man and said the man " 'was definitely on drugs.' " Fingerprints taken from the victim's residence were determined to be appellant's fingerprints. The neighbor positively identified appellant in a photo lineup.

Appellant pleaded no contest to the charge and the court imposed, but suspended, a six-year prison term. Appellant was granted three years of formal probation and the court ordered him to attend a residential drug rehabilitation program with the Jericho Project.

On April 14, 2008, a petition to revoke appellant's probation was filed on the ground that appellant had failed to complete the Jericho Project. Appellant admitted the violation and the court revoked and reinstated his probation on the condition that he serve 60 days in jail and participate in and successfully complete an Educational Sentencing Program.

On June 9, 2009, the court summarily revoked appellant's probation. Appellant admitted to violating his probation for failing to obey all laws, failing to abstain from alcohol, failing to pay restitution, and using cocaine. The court reinstated appellant's probation on July 21, 2009, and ordered him to serve six months in jail.

On June 17, 2010, the court summarily revoked appellant's probation for failure to pay restitution. The court reinstated appellant's probation on June 21, 2010, and

extended it one year. In extending appellant's probation, the court stated, "So at this time you'll be relieved from all your other terms and conditions, other than you need to report to probation, you need to make the [restitution] payments through them, work out a schedule with them. I'll extend your probation for a year. Any other TASC outpatient, any of those other aspects of your probation, that will cease. Essentially, the only term and condition is the payment of restitution. So all your testing, all your search and seizure, that's all now ended. [¶] . . . [¶] . . . Unless it becomes a problem, then it can be reinstated again." Appellant was ordered to pay "no less than $40 a month" in restitution.

On November 15, 2010, the court summarily revoked appellant's probation and a felony complaint was filed in case SCR592439, charging appellant with grand theft (§ 487, subd. (c), count 1) and receipt of stolen property (§ 496, subd. (a), count 2) and alleging he had suffered a prior conviction for a violent or serious felony (§§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i)). At a preliminary hearing held on November 24, 2010, Sonoma County Sheriff's Department Deputy James Percy, who had been temporarily assigned to the Cotati Police Department, testified that on November 10, 2010, he responded to a report that a theft had occurred. The victim said her $3,500 engagement ring was stolen from her house and that she believed her brother, appellant, had taken it. She had last seen the ring on November 7, 2010, and noticed it was missing on November 10, 2010. The victim said she suspected appellant and that she looked through his cell phone—which he had forgotten in her car—and discovered a picture of her ring in his phone.[2] After Percy "confirmed through records" that appellant was on "active felony probation with full search and seizure," he went to the location where appellant was staying and found a hypodermic needle and a backpack that had indicia of appellant's name on it. Percy arrested appellant for violation of probation and advised

[2] According to the probation report, the victim also told Percy that she had allowed appellant to stay in a wooden shed on her property for the two weeks before her ring went missing. The victim, who believed appellant had taken the ring to support his drug habit, said that the picture of the ring in appellant's phone had a date stamp of November 8, 2010. The victim learned from appellant's girlfriend that appellant had recently come into possession of a ring and had sold it.

him of his *Miranda* rights (*Miranda v. Arizona* (1966) 384 U.S. 436). Appellant waived his rights and told Percy he took the ring from his sister's residence and sold it to a woman named Linda for $250 because he had received a telephone communication from his cocaine dealer stating appellant owed $500. Linda Silva testified that on November 8, 2010, she was communicating with appellant by text message when he offered to sell her a diamond ring for $250. He said the ring was from a previous relationship that did not work out and he needed the money to pay his rent. She agreed to purchase the ring and gave him $250 in exchange for it. Shortly thereafter, law enforcement officers contacted her and she learned the ring had allegedly been stolen.

On December 8, 2010, appellant entered into a plea agreement with the district attorney's office in which he pleaded guilty to the charges and the prior strike allegation was dismissed. At the hearing at which appellant entered his plea, the court stated that appellant's maximum exposure for the two cases was six years and eight months, consisting of the six year term that was imposed but suspended in case SCR507217 and an additional eight months in case SCR592439. The court also noted there was a third case, "a trailing 11350 [possession of controlled substance] felony," which was to "be dismissed at the time of sentencing with a *Harvey* waiver [*People v. Harvey* (1979) 25 Cal.3d 754] in case there is some drug treatment proposed." The court found appellant was in violation of his probation in case SCR507217, due to his plea in SCR592439.

At sentencing on January 20, 2011, the court stated, "This is an incredibly abysmal record for someone so young. . . . I didn't realize you had been at Jericho for that long before. I noted there have been other attempts locally at helping you get the tools you need to get off of drugs. . . . I don't know what it will take, but part of my job is to protect the community. . . . No one wants to see you go to prison. But you have earned prison." The court went through appellant's criminal history and stated, "So if you've seen the probation report and gone over it with your attorney, they are basically saying enough is enough. We have attempted programs for you and they haven't worked." Nevertheless, the court imposed, but suspended, a sentence of six years and eight months and placed appellant on four years of probation. The court also ordered appellant to serve

one year in county jail and to be released to the Jericho Project as soon as bed space became available. The court ordered appellant to complete the Jericho Project and stated, "before you leave [the program], I want you to have one clear thought in your mind, you'll be going to state prison if you leave it without completing it. So you are making that choice when you walk out that door and violate their rules, do you understand that?" Appellant said he understood. The court reinstated probation in the first case and ordered appellant to, among other things, "[p]articipate/complete residential drug rehabilitation program and do not leave without prior written consent of [probation officer]/Program Director[.]"

On February 24, 2011, the court revoked probation in both cases—SCR507217 and SCR592439—on the ground that appellant had been discharged from the Jericho Project. At a probation violation hearing on April 6, 2011, the intake coordinator at Jericho Project testified he transported appellant from jail to the Jericho Protect on January 31, 2011. On February 18, 2011, appellant was discharged from the program for his "negative attitude" and for having inappropriate conversations with other clients in the program. The court found appellant was in violation of his probation in both cases and sentenced him to six years and eight months in state prison.

Appellant filed a notice of appeal and requested a certificate of probable cause. The court granted his request for a certificate of probable cause.

DISCUSSION

Ineffective Assistance of Counsel

Appellant contends his attorney rendered ineffective assistance of counsel by failing to move to suppress evidence recovered in a probation search. Specifically, he argues counsel should have moved to suppress his admission to law enforcement that he stole and sold his sister's ring because the admission was made after a warrantless arrest that was based on evidence of a probation violation—a hypodermic needle—that was discovered during an illegal search. We reject the contention.

" ' "In order to establish a claim of ineffective assistance of counsel, defendant bears the burden of demonstrating, first, that counsel's performance was deficient

because it 'fell below an objective standard of reasonableness [¶] . . . under prevailing professional norms.' [Citations.] Unless a defendant establishes the contrary, we shall presume that 'counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy.' [Citation.] If the record 'sheds no light on why counsel acted or failed to act in the manner challenged,' an appellate claim of ineffective assistance of counsel must be rejected 'unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation.' [Citations.] If a defendant meets the burden of establishing that counsel's performance was deficient, he or she also must show that counsel's deficiencies resulted in prejudice, that is, a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' [Citation.]" ' [Citations.]" (*People v. Salcido* (2008) 44 Cal.4th 93, 170.)

Here, it cannot be said from the record that counsel had no tactical reason for not filing a motion to suppress. As noted, appellant entered into a plea agreement with the district attorney's office providing that his prior strike would be dismissed in exchange for his guilty plea. The court accepted the plea, granted probation, and imposed, but suspended, a sentence that was less than what it would have been had the prior strike not been dismissed. Further, aside from appellant's admission, there was ample evidence linking appellant to the crimes. The victim reported to law enforcement that her ring was missing. She suspected appellant and believed he had taken it to support his drug habit. Appellant had the opportunity to take the ring, as he had been staying on the victim's property for two weeks before the ring went missing. When the victim searched appellant's cell phone, she found a photo of her ring that had a date stamp of November 8, 2010, which was one day after the victim last saw her ring, and two days before she discovered it was gone. The victim also learned from appellant's girlfriend that appellant had recently come into possession of a ring and had sold it. In light of a plea agreement under which a prior strike would be dismissed, and the existence in the record of enough incriminating evidence other than appellant's admission to prosecute

appellant, counsel could have reasonably determined that fighting the charges by filing a motion to suppress could have resulted in a less favorable outcome for appellant. " '[E]xcept in those rare instances where there is no conceivable tactical purpose for counsel's actions,' claims of ineffective assistance of counsel generally must be raised in a petition for writ of habeas corpus based on matters outside the record on appeal. [Citations.]" (*People v. Salcido, supra,* 44 Cal.4th at 172.) Appellant has not met his burden of showing from this record that counsel's performance " 'fell below an objective standard of reasonableness [¶] . . . under prevailing professional norms.' [Citations.]" (*Id.* at p. 170.)

Moreover, even assuming that counsel's performance was deficient because a motion to suppress appellant's admission would have been meritorious and there is no satisfactory explanation for the failure to file the motion, we conclude appellant's contention fails because he has not met his burden of showing he was prejudiced. Appellant asserts he was prejudiced because "[n]o other evidence was seized or discovered to either establish the offenses or to connect appellant to the offenses," and "[t]he prosecution would have had no choice but to dismiss the charges." However, as we concluded above, there was enough evidence aside from appellant's admission to prosecute appellant. Appellant therefore has not established there was "a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' [Citation.]" ' [Citations.]" (*People v. Salcido, supra,* 44 Cal.4th at p. 170.)

Revocation of Probation

Section 1203.2, subdivision (a), authorizes the court to revoke probation after proper notice and a hearing "if the interests of justice so require and the court, in its judgment, has reason to believe from the report of the probation or parole officer or otherwise that the person has violated any of the conditions of his or her supervision . . . ." Once a court had determined that a violation of probation has occurred, it must "decide whether under all of the circumstances the violation of probation warrants revocation." (*People v. Avery* (1986) 179 Cal.App.3d 1198, 1204.)

The court is vested with broad discretion in determining whether to reinstate probation following revocation of probation (*People v. Jones* (1990) 224 Cal.App.3d 1309, 1315), and its decision to revoke probation is reviewed for an abuse of discretion. (*People v. Rodriguez* (1990) 51 Cal.3d 437, 443; *People v. Downey* (2000) 82 Cal.App.4th 899, 909-910.) "[G]reat deference is accorded the trial court's decision, bearing in mind that '[p]robation is not a matter of right but an act of clemency, the granting and revocation of which are entirely within the sound discretion of the trial court. [Citations.]' [Citation.]" (*People v. Urke* (2011) 197 Cal.App.4th 766, 773.) " '[O]nly in a very extreme case should an appellate court interfere with the discretion of the trial court in the matter of denying or revoking probation . . . .' " (*People v. Rodriguez, supra,* 51 Cal.3d at p. 443.)

Appellant contends the court erred by revoking his probation in his first case (the burglary case) based on "a new law violation," then for "being discharg[ed] from the Jericho Project," because the court had lifted all probation conditions except payment of restitution when it extended his probation for one year on June 21, 2010. Essentially, his position is that the court could have properly revoked probation in the burglary case only for nonpayment of restitution, and for no other reason. Appellant forfeited this claim by failing to raise it below. (See *People v. Smith* (2001) 24 Cal.4th 849, 852 [only claims properly raised and preserved are reviewable on appeal].) In any event, his contention is without merit.

First, we reject appellant's claim that the court erred in revoking his probation based on a "new law violation," i.e., his plea in the second case (the ring case). As noted, in extending appellant's probation in the burglary case for one year on June 21, 2010, the court stated, "So at this time you'll be relieved from all your other terms and conditions, other than you need to report to probation, you need to make the [restitution] payments through them, work out a schedule with them. I'll extend your probation for a year. Any other TASC outpatient, any of those other aspects of your probation, that will cease. Essentially, the only term and condition is the payment of restitution. So all your testing, all your search and seizure, that's all now ended." However, the court never stated it would allow appellant to remain on probation if he committed a new crime. In its written

order modifying probation, the court stated only that the "TASC outpatient terms" and "search/seizure [terms]" had been "vacated," and specifically noted, "All other terms & conditions remain in full force & effect." Moreover, "[i]t is implicit in every order granting probation that the defendant refrain from . . . engaging in criminal practices," because "[p]robation is granted to the end that a defendant may rehabilitate himself, make a responsible citizen out of himself and be obedient to the law." (*People v. Cortez* (1962) 199 Cal.App.2d 839, 844.) Thus, although the court extended appellant's probation for one year specifically for the purpose of ensuring that he made his restitution payments, the commission of a new crime during that one year period was sufficient grounds to revoke his probation. There was no abuse of discretion.

Second, we conclude that appellant's failure to complete the Jericho Project was also sufficient grounds to revoke his probation. "[T]he court has jurisdiction, upon revocation of probation, to place the defendant upon a new probation, with new conditions." (*In re Bine* (1957) 47 Cal.2d 814, 817; § 1203.2, subd. (b)(1).) "A change in circumstances is required before a court has jurisdiction to extend or otherwise modify probation." (*People v. Cookson* (1991) 54 Cal.3d 1091, 1095.) "[A] change in circumstance could be found in a fact " 'not available at the time of the original order. . . .' " (*Ibid*.)

Here, appellant's plea and subsequent conviction in the ring case was a change in circumstances authorizing the court to modify probation in the burglary case. The record shows the court did in fact modify probation to require appellant to "[p]articipate/complete residential drug rehabilitation program and do not leave without prior written consent of [probation officer]/Program Director." The court also made it clear at sentencing that appellant was "going to state prison" if he failed to complete the Jericho Project, and appellant said he understood. Thus, when appellant was discharged from the Jericho Project just a few weeks after he reentered the program, the court was authorized to revoke probation on that ground. There was no error.

Fees

Appellant contends that a $649 probation report preparation fee and $649 probation supervision fee must be stricken because "they were not orally imposed by the judge at sentencing." He also asserts that a $80 court security fee that was imposed must be reduced to $40 "as was orally pronounced by the . . . judge." Appellant appears to have overlooked the fact that the court imposed the probation-related fees and an $80 court security fee when it sentenced appellant to probation on January 20, 2011. The court stated, "There is a $649 report preparation fee. . . . There is also [a] $649 probation supervision fee . . . [and a] $80 court security fee." There were no objections to the stated fees. The contention is without merit.

DISPOSITION

The judgment is affirmed.

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McGuiness, P.J.

We concur:

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Pollak, J.

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Jenkins, J.